IT IS SO ORDERED.

Guy R. Humphrey
United States Bankruptcy Judge

Dated: March 08, 2011

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: WESTON A. LORENZ, *Debtor*	Case No. 09-31913 Adv. No. 10-3264
RUTH A. SLONE, TRUSTEE, *Plaintiff* v. WESTON A. LORENZ ET AL., *Defendants*	Judge Humphrey Chapter 7

Decision Granting Plaintiff's Motion to Amend Complaint and Denying Motions of Defendants Weston A. Lorenz, Geoffrey Lorenz and Lorenz Properties (Lorenz Properties, LLC) to Dismiss Plaintiff's Complaint

I. INTRODUCTION

This matter is before the court on the *Motion Of Defendants Geoffrey Lorenz and Lorenz Properties (Lorenz Properties, LLC) To Dismiss Plaintiff's Complaint* (Adv. Doc. 16); the *Motion to Dismiss Complaint to Avoid Preferences and Post-Petition Transfers, Compel Turnover of Property, and Obtain Money Judgment* (Adv. Doc. 17) filed by the debtor, Weston A. Lorenz (collectively, the "Motions to Dismiss"); *Plaintiff's Response To Motion To Dismiss* (Adv. Doc. 21); the *Motion For Leave To Amend Complaint* (Adv. Doc. 22); the *Defendants Geoffrey Lorenz and Lorenz Properties (Lorenz Properties, LLC) Reply To Plaintiff's Response To Motion To Dismiss* (Adv. Doc. 24); *Defendants Geoffrey Lorenz and Lorenz Properties (Lorenz Properties, LLC) Objection To Plaintiff's Motion For Leave To Amend Complaint* (Adv. Doc. 26); and *Plaintiff's Reply To Defendants' Response To Plaintiff's Motion For Leave To Amend Complaint* (Adv. Doc. 27). Geoffrey Lorenz, Lorenz Properties, LLC and Weston Lorenz will be collectively referred to as the "Lorenz Defendants."

For the reasons set forth below, the court denies the Motions to Dismiss and grants the motion for leave to amend the complaint. Specifically, the court finds that Plaintiff's Complaint, as filed and as proposed to be amended, sets forth sufficient facts to state claims for relief to avoid potential preferences, post-petition transfers, and fraudulent conveyances through use of the separate alter ego remedy recognized by the Sixth Circuit Court of Appeals in *Brennan v. Slone (In re Fisher)*, 296 Fed. Appx. 494, 2008 WL 21648 (6th Cir. 2008).

II. STATEMENT OF FACTS, PROCEDURAL BACKGROUND AND POSITIONS OF THE PARTIES

A. Statement of Facts

The facts set forth in this decision are based upon the Complaint (Adv. Doc. 1) as proposed to be amended through the *Motion for Leave to File Amended Complaint* (Adv. Doc. 22) and, for purposes of this decision, are accepted as true. *See Jones v. City of Cincinnati,* 521 F.3d 555, 559 (6th Cir. 2008) (allegations in a complaint are deemed true for purposes of a motion to dismiss for failure to state a claim). In addition, as to the debtor's *Motion to Dismiss*, the court has also considered the debtor's Schedules (A-J) and Statement of Financial Affairs (Estate Doc. 1).

The debtor, Weston A. Lorenz (the "Debtor"), filed his Petition, Schedules, and Statement of Financial Affairs on April 1, 2009 (Estate Doc. 1). The Petition lists the Debtor as Weston A. Lorenz, with the following in the "All Other Names" box: "DBA Lorenz Aerospace Industries, LLC, dba Bimini Bills; DBA Paper Street Soap Company, LP, dba Yellow Rose Night Club; DBA Lorenz Properties, LLC." In addition, Schedule B, Item 13 (Stock and interests in incorporated businesses) states:

> Weston Lorenz DBA Lorenz Properties, LLC. This is a sole proprietorship LLC its only asset is a mortgagge [sic] on real estate located at 118 E. Fourth Street, Dayton, Ohio. The LLC's liability with regard to the funding of this mortgage is equal to the debt. The LLC is used to collect the mortgagee payment and make the debt payment on behalf of the investor. The accountant is unsure at the time of filing as to whether this transaction will appear on schedule C or schedule E of the Debtors personal income tax return. It should have no significant effect on taxable income on the Debtor's amend return or the 2008 return all of which should be filed by April 15, 2009.

Item 10 of the Statement of Financial Affairs states:

> Debtors, LLC Lorenz Properties sold 212 South Ludlow Street, Dayton OH and closed on September 11, 2008. The LLC received nothing from the transaction. The Purchaser was Demetrius Wright. The Proceeds were used to pay mortgages and settlement costs and debts owed both by Lorenz Aerospace Industries, LLC and Lorenz Properties, LLC. This transaction involved the sale of the real estate where the Bimini Bill's Bar had formerly been located. The closing statement is available for review.

Item 18 of the Statement of Financial Affairs lists "Lorenz Properties, LLC" as a business of the Debtor. Paragraph 2 of the Complaint initiating this adversary proceeding (the "Complaint") states:

> On Schedule B of his petition, Debtor stated that Lorenz Properties, LLC was a sole proprietorship. ("Lorenz Properties") In his 2006 and 2007 Federal Income Tax Returns, Debtor reported the financial results of Lorenz Properties on Schedule C as a sole proprietorship. The records of the Secretary of State of the State of Ohio report that an entity called "Lorenz Properties, LLC" was created on December 1, 2003. Based upon information and belief, and with the expectation that further discovery will confirm the truth of this allegation, the trustee alleges that Debtor operated Lorenz Properties, Lorenz Aerospace Industries and Paper Street Soap Company as sole proprietorships and co-mingled the assets of those businesses with his personal assets such that the property ostensibly held in the names of these businesses were assets of Debtor's bankruptcy estate and that these businesses were *alter egos* of Debtor.

Complaint (Adv. Doc. 1).

Pursuant to documents dated October 21, 2004, Lorenz Properties entered into an agreement to purchase property at 118 East Fourth Street (the "Property") from Dayton Power and Light Company and assigned its rights to purchase the Property to Dellsa Development Corporation, Inc. ("Dellsa") (Adv. Doc. 1, ¶ 7). In order to finance the purchase of the Property, the Debtor, and his father, Geoffrey Lorenz, borrowed $350,000 from Bank One on October 26, 2004, secured by real estate Geoffrey Lorenz owned in South

Carolina (Adv. Doc. 1, ¶ 8; the "Bank One Promissory Note" attached to Complaint). On October 21, 2004 Lorenz Properties, LLC loaned Dellsa $330,000 to complete the purchase of the Property and executed a cognovit note (Doc. 1, ¶ 9; the "Dellsa Note" attached to the Complaint). The Dellsa Note was secured by a mortgage Dellsa granted to Lorenz Properties, LLC on the Property (Adv. Doc. 1, ¶ 9; the "Dellsa Mortgage" attached to the Complaint).

On March 25, 2009 Lorenz Properties, LLC "executed and delivered" a note payable to Geoffrey Lorenz in the amount of $330,000 (Adv. Doc. 1, ¶ 10; the "Lorenz Note" attached to Complaint). The note indicates it is effective as of October 26, 2004. *Id.* Also on March 25, 2009 the Dellsa Note and Dellsa Mortgage were assigned from Lorenz Properties, LLC to Geoffrey Lorenz and this assignment was recorded in Montgomery County, Ohio on March 26, 2009 (Adv. Doc. 1, ¶ 11; Lorenz assignment attached to Complaint).

The Bank One Promissory Note that ultimately financed the acquisition of the Property by Dellsa was entered into by the Debtor and Geoffrey Lorenz individually, and not by Lorenz Properties, LLC. However, the Dellsa Note was payable to "Lorenz Properties, LLC" and the Dellsa Mortgage was granted to "Lorenz Properties, LLC."

B. Procedural Background

On April 1, 2009 Weston A. Lorenz filed a voluntary petition for relief under Chapter 7 of Title 11 of the United States Code[1] (Estate Doc. 1). The Debtor listed "Lorenz Properties, LLC" as a trade name he was doing business as on Official Form 1 and referred to "Lorenz

[1] Unless otherwise noted, all statutory references are to the Bankruptcy Code of 1978, as amended, 11 U.S.C. §§ 101-1532 (the "Code"), cited hereinafter in this decision as "§___".

Properties, LLC" as a "sole proprietorship LLC" on his Schedule B. The Debtor received a discharge on August 4, 2009 (Estate Doc. 27).

On July 10, 2010 the Chapter 7 Trustee, Ruth A. Slone (the "Trustee"), filed an adversary proceeding against Weston Lorenz, Geoffrey Lorenz, Dellsa Development Corporation, Inc. ("Dellsa") and JP Morgan Chase & Co. ("JP Morgan") (Adv. Doc. 1). The Complaint alleges, in summary, that (1) Geoffrey Lorenz received a $35,000 avoidable preference payment, as an insider, from the Debtor to repay some of his obligation on the Bank One Note; (2); the transfer of the Dellsa Note to Geoffrey Lorenz was an avoidable preference worth $244,443.49; (3) JP Morgan, as the successor to Bank One, received $12,000 in preference payments on the Bank One Note; (4) post-petition payments received by the Debtor on the Dellsa Note, subsequently transferred to Geoffrey Lorenz, constitute avoidable post-petition transfers; (5) post-petition payments received by the Debtor on the Dellsa Note, subsequently transferred to JP Morgan, constitute avoidable post-petition transfers; (6) the Debtor has failed to turn over to the Trustee the Dellsa Note, Dellsa Mortgage and the post-petition payments made on these assets, all of which constitute property of the Debtor's bankruptcy estate and (7) Dellsa failed to turnover payments on the Dellsa Note, which payments constitute property of the Debtor's bankruptcy estate.

Geoffrey Lorenz and Lorenz Properties, LLC moved to dismiss the claims against them on August 18, 2010 (Adv. Doc. 16) and the Debtor moved to dismiss the claims against him on August 20, 2010 (Adv. Doc. 17).[2] The Trustee filed a response on September 9, 2000 (Adv. Doc. 21) and Geoffrey Lorenz filed a reply on September 20, 2010 (Adv. Doc. 24).

[2] The Debtor's motion to dismiss was incorrectly docketed as an answer.

On September 10, 2010 the Trustee moved for leave to amend the Complaint (Adv. Doc. 22). The Trustee wishes to add a fraudulent transfer claim (under §§ 544 & 548 and Ohio law) against Geoffrey Lorenz, concerning the transfers of the Dellsa Note and Dellsa Mortgage made in March 2009. Geoffrey Lorenz objected to the motion on October 1, 2010 (Adv. Doc. 26) and the Trustee filed a reply on October 9, 2010 (Adv. Doc. 27).

JP Morgan and Dellsa entered into a stipulation with the Trustee providing that their respective Rule 12 responses were not required to be filed until after the resolution of Geoffrey Lorenz's motion to dismiss and the Trustee's *Motion for Leave To Amend Complaint* (Adv. Docs. 23 & 25).

C. The Lorenz Defendants' Positions

In their Motions to Dismiss, the Lorenz Defendants[3] assert as their primary argument, that Lorenz Properties, LLC is a separate and properly formed limited liability company under Ohio law. They further argue that the Trustee's causes of action are dependent upon Ohio law allowing the Trustee to reach the assets of Lorenz Properties, LLC, as if these were the Debtor's assets, under the theory of reverse piercing the corporate veil. They argue that decisions from the Supreme Court of Ohio establish that Ohio law does not recognize this doctrine and, in addition, Ohio law does not recognize alter ego as a separate remedy, and, consequently, neither of these theories allows the Trustee to reach the assets of Lorenz Properties, LLC.

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[3] The Debtor's motion to dismiss adopts the arguments of Geoffrey Lorenz and Lorenz Properties, LLC and, therefore, will not be separately addressed in this decision and is denied for the same reasons as the motion to dismiss filed by Geoffrey Lorenz and Lorenz Properties, LLC.

The Lorenz Defendants further argue, even if reverse piercing was a recognized doctrine, the Trustee's allegations fail to plead the necessary elements, namely fraud or an illegal act and control of the corporation. Similarly, they assert that, even assuming Ohio recognizes the alter ego theory, the Trustee has failed to plead the necessary elements of an alter ego claim because the listing of Lorenz Properties, LLC as a "sole proprietorship" on Schedule B and the Debtor's accounting for the income and expenses of Lorenz Properties, LLC on his personal income tax return through Schedule C of his Internal Revenue Service Form 1040 are insufficient facts to allege alter ego.

Geoffrey Lorenz and Lorenz Properties, LLC oppose the Trustee's *Motion for Leave to Amend Complaint*: a) for the same reasons that they seek dismissal of the Complaint; because they assert that: b) the Trustee lacks standing to prosecute a claim or remedy based on the theory of alter ego under § 541; c) the Trustee cannot pursue her claims as a hypothetical lien creditor under §§ 544 & 548 and Ohio Revised Code (ORC) §§ 1336.04 & 1336.05(B) because the transfer of the Dellsa Mortgage was completed pre-petition and, therefore, Geoffrey Lorenz holds the superior right of a secured creditor; and d) Geoffrey Lorenz is protected from a fraudulent conveyance claim under § 548 based upon the good faith defense provided by § 548(c).

D. The Trustee's Positions

The Trustee essentially disputes all of the Lorenz Defendants' positions, asserting that Lorenz Properties LLC was not a separate legal entity from the Debtor and that any asserted separate legal existence of that entity may be ignored because of its incomplete organization. The Trustee asserts that Ohio recognizes both the reverse piercing of the

corporate veil theory and the alter ego theory, and that the Trustee may avoid the transfers because Lorenz Properties or Lorenz Properties LLC at all pertinent times has been the alter ego of the Debtor. In the alternative, the Trustee asserts that she may pierce the corporate veil of Lorenz Properties LLC and avoid the transfers. The Trustee also contends that the Dellsa Note and Dellsa Mortgage are assets of the Debtor's bankruptcy estate regardless of whether the alter ego or reverse piercing doctrines are applied. The Trustee asserts that the Complaint and proposed Amended Complaint sufficiently plead the avoidable transfer claims against the defendants.

III. LEGAL ANALYSIS

A. Jurisdiction

This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(a) and 1334 and General Order No. 05-02 of the United States District Court for the Southern District of Ohio. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K) and (O).

B. Standard For A Motion to Dismiss Under FRCP 12(b)(6)

A motion to dismiss under Federal Rule of Civil Procedure (FRCP) 12(b)(6), applicable to adversary proceedings through Federal Rule of Bankruptcy Procedure (BR) 7012(b), for failure to state a claim upon which relief can be granted challenges the legal sufficiency of a complaint. In determining a motion to dismiss, the court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Jones v. City of Cincinnati,* 521 F.3d 555, 559 (6th Cir. 2008), *quoting, DirecTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). However, in

determining such a motion, a court "need not accept as true legal conclusions or unwarranted factual inferences." *Id*.

The Supreme Court recently clarified the law concerning what a plaintiff must plead in order to survive a FRCP 12(b)(6) motion. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Under the standard established by *Bell Atlantic Corp. v. Twombly*, the Supreme Court had instructed lower courts to dismiss claims not supported by factual allegations sufficient to "state a claim to relief that is *plausible* on its face." 550 U.S. 544, 570 (2007) (emphasis added). Some courts interpreted *Twombly* to only apply in antitrust cases and other courts found that *Twombly's* pleading requirements could be overcome with a mere assertion of a defendant's responsibility. *Iqbal* makes clear that *Twombly* is not so limited and buttresses the *Twombly* plausibility standard. In *Iqbal*, quoting *Twombly*, the Supreme Court held that Rule 8(a) requires "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (internal citations omitted). Furthermore, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

According to the Court, deciding the adequacy of a complaint requires a two-step analysis. First, a court should identify and reject legal conclusions unsupported by factual allegations, because conclusions masquerading as allegations "are not entitled to the assumption of truth." *Id.* at 1950. Insufficient are "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements", "labels and conclusions", and "'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* at 1949. In sum, a complaint that alleges that a defendant caused a plaintiff's injury, without explaining how,

does not meet the requirements of FRCP 8(a) and therefore cannot survive a FRCP 12(b)(6) motion. Second, a court should assume the veracity of "well-pleaded factual allegations" and should conduct a "context-specific" analysis that "draw[s] on [the court's] judicial experience and common sense" to determine whether the allegations "plausibly give rise to an entitlement to relief." *Id.* at 1950. Well-pleaded facts that "do not permit the court to infer more than the mere possibility of misconduct" are insufficient to show that plaintiff is entitled to relief. *Id.*

"A court that is ruling on a Rule 12(b)(6) motion may consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice." *New England Health Care Emps. Pension Fund v. Ernst & Young, LLP,* 336 F.3d 495, 501 (6th Cir. 2003), *cert. denied,* 540 U.S. 1183 (2004); *See also City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 655, fn. 1 (6th Cir. 2005) (Fed. R. Evid. 201 providing that "[a] court may take judicial notice, whether requested or not" of a "judicially noticed fact" which "must be one not subject to reasonable dispute," a requirement satisfied if the fact is "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

C. The Trustee's Complaint States Claims For Relief Premised Upon Application of the Alter Ego Doctrine

1. The Alter Ego Doctrine and Reverse Piercing of the Corporate Veil

In order for the Trustee to prevail, she must establish that either: a) the assets asserted to be those of "Lorenz Properties, LLC" were owned individually by the Debtor; or b) the separate legal existence of Lorenz Properties, LLC should be disregarded under the

doctrines of reverse piercing of the corporate veil or alter ego. Otherwise, the transfers sought to be recovered by the Trustee were those of a non-debtor, a limited liability company, and cannot be recovered by the Trustee using her avoidance powers. Thus, an examination of the concepts of reverse piercing of the corporate veil and alter ego is in order.

The doctrine of "reverse piercing of the corporate veil" is a remedial theory or principle used by creditors or those who may stand in the shoes of creditors, such as a bankruptcy trustee, to reach the assets of a legal entity owned by or in which the debtor holds an interest. Under the traditional piercing of the corporate veil theory, the debtor is a legal entity and the creditors of the legal entity seek to reach the assets of the owner or principal of the entity. *See Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos.*, Inc., 617 N.E.2d 1075 (Ohio 1993); *Domborski v. WellPoint, Inc.*, 895 N.E.2d 538 (Ohio 2008). Based on the Sixth Circuit's decision in *Bucyrus-Erie Co. v. Gen Prods. Corp.*, 643 F.2d 413 (6th Cir. 1981), Ohio adopted a three part test in *Belvedere* for piercing the corporate veil:

> The corporate form may be disregarded and individual shareholders held liable for wrongs committed by the corporation when (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.

Belvedere, 617 N.E.2d at 1078. In *Wellpoint*, the Supreme Court of Ohio rejected decisions that had interpreted the second prong of *Belvedere* liberally to include unjust or inequitable acts, but modified the second prong to include "similarly unlawful" acts. *Wellpoint*, 895 N.E.2d at 540.

By contrast with the *Belvedere* test, under the theory of reverse piercing of the corporate veil, the creditors or trustee seek to reach the assets of a legal entity in which the debtor holds an interest. In this case, the Trustee of Weston Lorenz's Chapter 7 case seeks to reach assets that the Lorenz Defendants assert are or were the assets of Lorenz Properties, LLC, a purported separate legal entity.

The court agrees with the Lorenz Defendants' assertion that Ohio law does not recognize reverse piercing of the corporate veil. As determined by *Brennan v. Slone* (*In re Fisher*), Ohio courts have not adopted the concept of reverse piercing of the corporate veil, 296 Fed. Appx. 494, 506, 2008 WL 21648, at *28 (6th Cir. 2008). Other case law does not support the theory of reverse piercing in Ohio. *See Winston v. Leak*, 159 F.Supp.2d 1012, 1018 (S.D. Ohio 2001) (reverse piercing not recognized in Ohio); *Geiger v. King*, 815 N.E.2d 683, 686 (Ohio Ct. App. 2004) (Ohio has not adopted the doctrine of reverse corporate veil piercing); *Mathias v. Rosser*, 2002 WL 1066937, at *6 (Ohio Ct. App. May 30, 2002) (similar). Therefore, based on the *Fisher* decision and other authority, reverse piercing of the corporate veil, based on the elements in *Belvedere*, as modified by *Wellpoint*, is not recognized in Ohio.

However, the *Fisher* panel addressed both the doctrines of reverse piercing of the corporate veil and alter ego in the Sixth Circuit and affirmed the trial court's finding that a corporation was the alter ego of its sole shareholder. *Fisher*, 296 Fed. Appx. at 507, 2008 WL 21648, at *31. In discussing that issue, the Sixth Circuit concluded that veil piercing and alter ego concepts are distinct theories. The panel stated that:

> Defendants argue that the bankruptcy court improperly applied reverse-piercing of the corporate veil, which has not been recognized in Ohio. To be sure, the Ohio courts have not adopted reverse-piercing, despite acknowledging that it has been permitted by other courts in limited cases

> where the corporation was found to be the alter ego of its controlling shareholders and a creditor was seeking assets of the corporation to satisfy the debts of the controlling alter ego. *Geiger v. King*, 158 Ohio App. 3d 288, 2004 Ohio 4227, 815 N.E.2d 683, 685 (Ohio Ct. App. 2004). This court has explained, however, that veil piercing and alter ego concepts are distinct. The former asks a court to hold A vicariously liable for B's debts, while the latter asserts that A and B are the same entity and therefore liability is direct. *IUAU Local 600 v. Aguirre*, 410 F.3d 297, 302 (6th Cir. 2005). Here, the bankruptcy court found that because Fisher and FDP were the same entity, FDP's inventory belonged to Fisher such that the transfer to Brennan was a transfer of an interest in property of the debtor.

Fisher, 296 Fed. Appx. at 506, 2008 WL 21648, at *27-28. *See also United States v. Toler*, 666 F. Supp. 2d 872, 886 (S.D. Ohio 2009) ("Given the recent decision by the Sixth Circuit on this very point of law, and because no subsequent decisions have questioned the analysis in *In re Fisher*, this Court finds that Ohio law does recognize alter ego doctrine as distinct from veil piercing.").

In *Fisher* the Sixth Circuit outlined the following as factors to be considered in determining an alter ego claim:

> In Ohio, the courts may consider a number of nonexclusive factors in deciding whether to disregard the corporate fiction under the alter ego theory. Those factors include: "(1) grossly inadequate capitalization, (2) failure to observe corporate formalities, (3) insolvency of the debtor corporation at the time the debt is incurred, (4) shareholders holding themselves out as personally liable for certain corporate obligations, (5) diversion of funds or other property of the company property for personal use, (6) absence of corporate records, and (7) the fact that the corporation was a mere facade for the operations of the dominant shareholder(s)." *Taylor Steel, Inc. v. Keeton*, 417 F.3d 598, 605 (6th Cir. 2005); *see also Carter-Jones Lumber Co. v. LTV Steel Co.*, 237 F.3d 745, 749 (6th Cir. 2001).

Fisher, 296 Fed. Appx. at 506, 2008 WL 21648, at *28-29. In *Toler* the District Court stated:

> In applying the alter ego test, not all of the seven factors must be met. In *Pottschmidt*, the court held that in order to satisfy the requirements of alter ego doctrine "a plaintiff must prove that the individual and the corporation are fundamentally indistinguishable." *Pottschmidt*, 169 Ohio App.3d at 836

> (internal citations omitted). The *Pottschmidt* court referenced only four factors in determining that the alter ego test had been met: "1) whether corporate formalities were observed; 2) whether corporate records were kept; 3) whether corporate funds were commingled with personal funds; and 4) whether corporate property was used for personal use." Id. (citing to *LeRoux's*, 77 Ohio App.3d at 422, which outlines the seven factors adopted by In re Fisher).

Toler, 666 F. Supp. 2d 872, 887, n. 13. The *Toler* court also noted that:

> Similarly, in *Taylor Steel*, the Sixth Circuit found that even where none of the factors had been found, a corporation was still the alter ego for its sole shareholder. 417 F.3d at 606; *see also Petro v. Mercomp*, 167 Ohio App. 3d 64, 71, 2006 Ohio 2729, 853 N.E.2d 1193 (Ohio Ct. App. 2006) (granting summary judgment even where the only factor considered for alter ego prong in piercing the corporate veil was that defendant was sole shareholder of corporation).

Id. at 887, n. 14.

The Lorenz Defendants have strenuously argued that Ohio law does not recognize the alter ego doctrine as a separate remedy and asserts it is only the first prong of the Belvedere test for piercing the corporate veil or, alternatively, it is simply a different nomenclature[4] to describe the concept of "piercing the corporate veil." However, the Sixth Circuit in *Fisher* considered *Belvedere* and determined alter ego is a separate remedy under

[4] The court is aware that certain cases, beginning with *Belvedere* itself, use, or appear to use, the term "alter ego" and "reverse piercing the corporate veil" interchangeably or refer to alter ego as only part of the *Belvedere* test. See, e.g, *In re Cincom iOutsource, Inc.*, 398 B.R. 223, 231, n. 8 (Bankr. S.D. Ohio 2008) (referring to the *Belvedere* test, as modified by *Wellpoint*, as the alter ego doctrine); *Winston*, 159 F.Supp.2d at 1018, n. 5 ("Reverse piercing occurs when assets of the corporate entity are used to satisfy the debts of the controlling alter ego."). See also *Hitachi Med. Sys. Am., Inc. v. Branch*, 2010 WL 3941824, at *3 (N.D. Ohio Sept. 14, 2010) (Reviewing *Fisher* and *Belvedere* and concluding that "it is unclear whether alter ego theory is a theory of recovery distinct from veil piercing or whether, under *Belvedere*, it is part of the first prong of the veil-piercing test."). Nevertheless, *Fisher*, without equivocation, addresses the issue of the alter ego doctrine, no other decision directly contradicts it, and it represents the Sixth Circuit's determination of the current state of Ohio law. Finally, the *Fisher* panel determined that its decision is consistent with *Belvedere* and *Wellpoint*. *See Toler*, 666 F.Supp.2d at 886 ("The Sixth Circuit did not find it necessary to turn to federal common law in order to determine the legal test for alter ego theory. Instead, it held that Ohio law recognizes the alter ego theory, and relied on cases citing Ohio law for determining the factors to be used in alter ego inquires."). *See also OSU Pathology Svcs., LLC v. Aetna Health, Inc.*, 2011 WL 738051, at *7 (Ohio Ct. App. Feb. 24, 2011) (noting that *Fisher* concluded that "'alter ego' and 'veil piercing' are actually distinct theories under Ohio law").

Ohio law and absent a decision from the Ohio courts or the Ohio General Assembly stating otherwise, this court, like the *Toler* decision from the District Court for the Southern District of Ohio, must apply *Fisher* and conclude that alter ego is a distinct remedy. This court need go no further to allow the alter ego remedy to survive a motion to dismiss.[5]

2. The Complaint Sufficiently Pleads Avoidable Transfer Claims Premised Upon the Theory that Lorenz Properties LLC Was the Alter Ego of the Debtor

Geoffrey Lorenz argues that the Complaint should be construed to solely raise an issue of whether reverse piercing of the corporate veil is available and should be applied. However, the court finds that the Complaint sufficiently pleads avoidable transfer claims premised upon the theory that "Lorenz Properties, LLC" was the alter ego of the Debtor, doing business as either "Lorenz Properties" or "Lorenz Properties, LLC." The allegations in Paragraph 2 of the Complaint are sufficient to plead the alter ego doctrine under Ohio law as set forth in *Fisher*, permitting the Trustee to proceed with her claims and an evidentiary determination of whether the remedy of alter ego should be applied under the facts of this adversary proceeding. Specifically, the allegations that Lorenz Properties, LLC was operated

[5] Although *Fisher* is unreported, there is no reported decision from the Sixth Circuit which directly addresses this question. *See In re Buttermilk Towne Center, LLC*, __ B.R. __, 2010 WL 5185870, at *8 (B.A.P. 6th Cir. Dec. 23, 2010) ("While it is true an unpublished decision is not binding . . ., the Panel should not disregard a Sixth Circuit decision merely because it is unpublished . . . . Buttermilk Towne Center has not cited any other Court of Appeals cases directly on point."). *Transition Healthcare v. Tri-State Health Investors, LLC*, 306 Fed. Appx. 273, 2009 WL 67869 (6th Cir. 2009) does not contradict *Fisher* or even cite that decision. While it notes correctly that the first prong of the *Belvedere* test has been referred to as the "alter ego doctrine," the case concerns piercing the corporate veil and does not directly address *Fisher's* legal conclusion that Ohio law recognizes the separate remedy of alter ego. Finally, the Lorenz Defendants' reference to *Bucyrus Erie v. Gen. Prods. Corp.*, 643 F.2d 413 (6th Cir. 1981) is of no avail because that case, as the *Fisher panel* would have been well aware, was the genesis of *Belvedere*, which the *Fisher* court directly addressed. *Minno v. Pro-Fab, Inc.*, 905 N.E.2d 613, 617 (Ohio 2009) prohibits the piercing the corporate veil doctrine to allow a "one corporation to reach its sister corporation." While like *Transition Healthcare* and other decisions, it appears to use the term "alter ego" and *Belvedere* interchangeably, it does not repudiate the decision in *Fisher* directly or even reference it.

as a sole proprietorship, treated in that manner for tax purposes in 2006 and 2007[6] and the assets of that company were commingled with the Debtor are sufficient to survive a motion to dismiss. As explained, alter ego is a fact-intensive factor test and it would not be appropriate to dismiss the Complaint under these circumstances.

3. The Trustee Has Standing to Pursue the Alter Ego Remedy

The Lorenz Defendants argue that the Trustee lacks standing to pursue the alter ego remedy under the property rights she acquired from the Debtor by virtue of § 541. They argue that the Trustee only holds those rights and interests which the Debtor held on the petition date and that since the Debtor could not sue himself to have a court declare that Lorenz Properties LLC is the same as himself, the Trustee could not hold these rights. They assert that only a creditor of an entity may avail itself of the alter ego remedy (Adv. Doc. 26, pp. 3-4). Based upon Sixth Circuit law, this argument fails.

In *Fisher* the Sixth Circuit rejected the defendants' argument. The *Fisher* court stated that "other courts have recognized that a bankruptcy trustee has standing to raise an *alter ego* theory in a trustee's action to collect the assets of the estate." *Fisher*, 296 Fed. Appx. at 505, 2008 WL 4569946, at *9, *citing Koch Refining v. Farmers Union Cent. Exch., Inc.*, 831 F.2d 1339, 1349-50 (7th Cir. 1987); *Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 132-34 (2nd Cir. 1993); and *Towe v. Martinson*, 195 B.R. 137, 140 (D. Mont. 1996). *But see also Mixon v. Anderson (In re Ozark Restaurant Equip. Co., Inc.)*, 816 F.2d 1222, 1225 (8th Cir. 1987) (Trustee

[6] The Lorenz Defendants argue that federal tax law required the Debtor to report his income, from a single member limited liability company, on his personal income tax return. The Trustee agrees, but notes that the Complaint raises the issue of why the Debtor listed the income on his Schedule C (Profit of Loss From Business) as a sole proprietorship, suggesting the assets, liabilities and income were the Debtor's and Lorenz Properties, LLC was merely a trade name. Regardless of whether that issue can be resolved upon a motion to dismiss, other facts alleged in Paragraph 2 of the Complaint are sufficient to plead the alter ego remedy.

lacked standing when alter ego doctrine not recognized under Arkansas law as a personal remedy of the corporation, as opposed to the corporation's creditors); and *Ahcom, Ltd. v. Smeding*, 623 F.3d 1248, 1252 (9th Cir. 2010) (Under California law a corporation and its shareholders cannot be treated as alter egos and, therefore, a bankruptcy trustee may not pursue claims based upon an alter ego theory).

The Seventh Circuit in *Koch Refining* engaged in an extensive analysis of this issue. The court concluded that "[w]hether the trustee is representing the estate or "standing in the shoes" of the creditors,[7] he has the duty to marshal the debtor's property for the benefit of the estate, and thus the right to sue parties for recovery of all property available under state law." The *Koch Refining* court then concluded that both Indiana and Illinois[8] recognized the alter ego doctrine and stated that:

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[7] A Chapter 7 trustee holds several different "buckets" of rights. First, a Chapter 7 trustee acquires all assets and rights and interests which the debtor held on the date of the filing of his bankruptcy case. Pursuant to § 704(a) the Trustee is charged with collecting and reducing to money the property of the estate. Property of the estate is broadly defined by § 541 and generally includes all interests in property of any nature held by the debtor at the time of the filing of the bankruptcy petition, including claims and causes of action against other people. Thus, these rights of a trustee are derivative of the debtor's rights and interests. These are the rights and interests which the Lorenz Defendants have focused on with respect to their argument that the Trustee does not hold the right to pursue an alter ego theory, i.e. that the Trustee does not have standing to pursue that theory. Second, a trustee acquires all of the avoidance powers provided by the Code, including the right to pursue preferences pursuant to § 547, fraudulent conveyances pursuant to Code § 548, and unauthorized post-petition transactions pursuant to § 549. These are rights that only a bankruptcy trustee (or a debtor in possession exercising the rights of a trustee pursuant to Code § 1107(a)) holds and are independent of any rights which the debtor or a creditor may have held on the date of the filing of the bankruptcy and, thus, are not derivative of any rights of the debtor or of an actual or hypothetical creditor. It is these avoidance rights that the Trustee is pursuing through use of the alter ego remedy. Additional avoidance powers are provided through § 544 -- these powers being frequently referred to as the trustee's "strong-arm" powers. It is through these powers that a trustee may step into the shoes of a hypothetical or actual creditor to avoid certain transactions, such as avoiding transfers that could be avoided by a bona fide purchaser of real property. *See Terlecky v. Abels,* 260 B.R. 446, 453 (S.D. Ohio 2001). The *Koch Refining* court was not making a determination as to which bucket of rights the alter ego remedy should be placed, but was determining that the alter ego theory was one of the rights which a bankruptcy trustee has in her arsenal to recover property for the bankruptcy estate if state law recognizes that doctrine.

[8] The parties did not address whether Indiana law or Illinois law was applicable so the court analyzed the law under the law of both states.

> State law permits the alter ego claim to be asserted by the trustee in pursuing all funds available as section 541 property of the estate. And federal bankruptcy law permits the trustee to recover property on behalf of all creditors for equitable distribution. Furthermore, this logical procedure obviates multiple liability of the debtor to separate creditors and accords with the Bankruptcy Code's ultimate goal of balancing the equities and interest of all affected parties in a bankruptcy case.

Koch Refining at 1345-46.[9] In this case, in *Fisher* the Sixth Circuit determined that Ohio law recognizes the alter ego theory so there is no reason to distinguish this case from *Fisher* or *Koch Refining* which was relied upon in *Fisher*.

The Lorenz Defendants appear to assert that the alter ego doctrine is an affirmative cause of action, such as a fraudulent conveyance or a preference claim, as opposed to a theory that is remedial in nature. The alter ego doctrine is a principle through which a claimant can obtain a declaration that an individual and a purported legal entity are one and the same or should be treated as such. The Trustee seeks a declaration that Weston Lorenz and "Lorenz Properties" or "Lorenz Properties, LLC" are one and the same or should be treated as a single entity. A trustee has standing to seek declaratory relief that the assets claimed to be those of a limited liability company are those of a debtor. As stated by the *Koch Refining* court:

> A Nevada bankruptcy court thoroughly considered similar issues in *In re Western World Funding, Inc.*, 52 Bankr. 743 (Bankr. D. Nev. 1985). Although its

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[9] Another way to analyze use of the alter ego theory is through the lens of BR 7001. That rule provides for the filing of adversary proceedings and provides that an adversary proceeding includes: "(1) a proceeding to recover money or property …; (2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property …; (9) a proceeding to obtain a declaratory judgment relating to any of the foregoing …." The court in *Koch Refining* discussed the pursuit of an alter ego theory by a trustee is a proceeding seeking a declaratory judgment as to the extent of the debtor's interest in property and a proceeding to recover that property for the benefit of the bankruptcy estate. Through application of the alter ego theory, the trustee may obtain a declaration that certain property is property of the debtor and property of the bankruptcy estate that may be recovered by the trustee through the state-law recognized alter ego remedy.

> determinations are not binding upon this court, its well-reasoned approach is noteworthy. In that case, the trustee's complaint contained allegations of breach of fiduciary duty, conversion of corporate assets, and alter ego. Defendants, controlling fiduciaries of the debtor, argued that the trustee was not authorized to bring the alter ego claim by either section 541 or 544(a) because it is a right of action which belongs to creditors personally. The bankruptcy court found that the trustee had standing to bring the alter ego action on several grounds. First, the trustee had the right to sue the debtor's fiduciaries under section 544 on behalf of all creditors, for it was they who should benefit from any recovery. *Id*. at 774. Under Nevada law, he could invoke the alter ego doctrine as a hypothetical lien creditor establishing the extent of his lien on all property which a creditor might reach to bring into the expansive section 541 definition of "property of the estate." *Id*. at 783. He could also use the doctrine, as the representative of the debtor's estate, to establish whether the assets of the alleged alter ego are subject to his administration because the debtor has an equitable interest in them. *Id*. at 783-4. And finally, the trustee is an "independent voice" protecting the creditors of the bankrupt corporation by asserting the alter ego claim against fiduciaries who would virtually never institute an action against themselves. *Id*. at 784.

Koch Refining, 831 F.2d at 1349-50. The *Koch Refining* court also found such standing and authority arising out of § 510 and a trustee's and court's authority to subordinate claims, stating:

> This clear statement by the Supreme Court that alter ego principles may be appropriate criteria for equitably subordinating or disallowing claims of fiduciaries, and that the trustee has standing to bring actions against fiduciaries, is universally upheld. Equitable subordination exemplifies the underlying premise of bankruptcy policy, which is an equitable balancing of the interests of all affected parties in a bankruptcy case. That balancing considers the degree of hardship faced by each party, as well as any qualitative differences in the hardships each may face, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527, 79 L. Ed. 2d 482, 104 S. Ct. 1188 (1984); but it also considers the level of duty owed by each party to the debtor and the good faith basis of their interactions. *Pepper v. Litton*, 308 U.S. at 306-07. The alter ego doctrine reflects that same tradition of equity, the same purposes of protecting innocent parties and of securing just, balanced results as does the equitable subordination doctrine. Both theories intend to produce results of inherent fairness to all interested parties at different stages of the bankruptcy proceeding. The equitable subordination doctrine applies when it is necessary to consider a fiduciary's relationship and obligations to the debtor at the time

> of distribution. Assuming that state law does not otherwise bar its use, the alter ego theory applies just as properly earlier in the bankruptcy proceeding to reach assets of fiduciaries that equitably belong in the debtor's estate.

Id. at 1351. *See also Towe*, 195 B.R. at 140 ("The application of the alter ego doctrine brings the assets of a bankruptcy debtor's alter ego into the bankruptcy estate.").

For the reasons stated, the court finds that the Trustee has standing to pursue the alter ego remedy.

4. In Pari Delicto Does Not Bar the Trustee's Pursuit of the Alter Ego Remedy

The Lorenz Defendants' standing argument relies upon *Titan Real Estate Ventures, LLC v. M.J.C.C. Realty L.P. (In re Flanagan)*, a case in which the court found that that an entity assigned certain causes of action by the trustee could not pursue the claims due to the in pari delicto doctrine. 373 B.R. 216, 226 (Bankr. D. Conn. 2007), *aff'd by,* 415 B.R. 29 (D. Conn. 2009). Setting aside *Fisher*, *Flanagan* is distinguishable. In this adversary proceeding, it does not appear that the Trustee is alleging that the Debtor committed any immoral, illegal or other bad acts for which the in pari delicto doctrine would be applicable. Rather, the Trustee has simply alleged that the Debtor operated "Lorenz Properties" as a sole proprietorship and not as a separate entity and that the pertinent assets are those of the Debtor because they were owned by the Debtor as a sole proprietorship or because the alter ego doctrine establishes that "Lorenz Properties, LLC" and the Debtor were one and the same. Thus, it does not appear that the in pari delicto doctrine has any application to the Trustee's allegations.

In any event, even if the Complaint, as proposed to be amended, did have such allegations or was required to have such allegations, the in pari delicto defense is not

applicable to the Trustee's claims. While the in pari delicto defense may be available for independent claims to which the trustee succeeds as the successor to the debtor, such as, for example, malpractice claims, that defense is not applicable to avoidance claims provided for by the Code, such as claims under §§ 544, 547, and 548. *See Terlecky v. Abels (In re Dublin Securities)*, 260 B.R. 446, 453 (S.D. Ohio 2001) (Sargus, J.) ("[T]he Trustee does not stand in the shoes of the Debtors seeking to recover property allegedly owed to the estate. Instead, the Trustee stands in the place of a creditor who would have standing to pursue a fraudulent conveyance action under Ohio law."); *GMAC v. Flynn* (*In re Midway Motor Sales, Inc.*), 407 B.R. 442, 2009 WL 1940719, at *7 (BAP 6th Cir. July 6, 2009); *Claybrook v. Broad and Cassel, P.A. (In re Scott Acquisition Corp.*), 364 B.R. 562, 574 (Bankr. D. De. 2007) (Trustee's claims under §§ 544, 548, and 550 and under the Florida fraudulent conveyance statutes "does not have an *in pari delicto* infirmity"). The *Flanagan* decision also appears to recognize this distinction. *Flanagan*, 373 B.R. at 226**.** Thus, even if the Trustee was basing her argument for recovery under the alter ego theory on alleged bad acts of the Debtor, which based upon the Complaint the court does not believe is the case, the doctrine would not be applicable because any "unclean hands" of the Debtor would not bar the Trustee from pursuing property recoverable by the bankruptcy estate under such circumstances.

Finally, a court can dismiss a complaint on a FRCP 12(b)(6) motion on the basis of the in pari delicto defense only if the complaint conclusively establishes that the defense applies. The in pari delicto defense involves a factual inquiry which in most situations would be improper on a motion to dismiss a complaint. *Antioch Litigation Trust v. McDermott Will*

& *Emery LLP*, 738 F.Supp.2d 758, 772-73 (S.D. Ohio 2010). Accordingly, dismissal based upon the in pari delicto doctrine would also be inappropriate for that reason.

D. The One Year Insider Provision of § 547(b)(4)(B) Does Not Apply to the Assignment of the Dellsa Note and Dellsa Mortgage

The Trustee is pursuing transfers to Geoffrey Lorenz as payments on the Dellsa Note. While not asserting any such payments were outside the one year insider period for preferences, Geoffrey Lorenz asserts the assignment of the Dellsa Note and Dellsa Mortgage from Lorenz Properties, LLC to Geoffrey Lorenz, which occurred on March 25, 2009 and was recorded on March 26, 2009, was more than one year prior to the filing of the Complaint and, therefore, cannot be avoided. However, the one year insider preference period runs from the date of the filing of the Debtor's Chapter 7 bankruptcy petition, not from the date of the filing of the Trustee's adversary Complaint. *See* 11 U.S.C. § 547(b)(4)(B) (transfers between ninety days and one year of the petition date may be a preference if the transferee is an insider). Accordingly, this argument does not support granting the Defendants' motion to dismiss.[10]

Moreover, to the extent the Lorenz Defendants are asserting the Trustee's claims under the alter ego remedy are barred by a statute of limitations or the one year look-back period for insiders, the alter ego doctrine is an equitable remedy that has no particular

[10] The Defendants also argue that the Trustee cannot pursue preferential transfers of money under Ohio law. *See Roberds, Inc. v. Broyhill Furniture (In re Roberds, Inc.)*, 313 B.R. 732 (Bankr. S.D. Ohio 2004), *citing Nat'l Bank of Commerce v. Gettinger*, 67 N.E. 739 (1903) (operating company cannot recover a payment of money as a preference under Ohio's preference statutes). The court understands the Complaint to only apply Ohio law for two purposes: 1) the assertion of the alter ego remedy and 2) and the pursuit of fraudulent transfers. The *Roberds* decision addressed the use of ORC § 1313.56 & 1313.57 to pursue preferences under Ohio law and is not applicable to the proposed Complaint. The preferential transfer claims appear based on § 547, but the Trustee may clarify this issue in her Amended Complaint. The claim under ORC § 1336.05(B) – while similar to a § 547 preference – is considered a fraudulent transfer under Ohio law.

statute of limitations or "effective date." Rather, the underlying avoidance causes of action each have separate statute of limitations, regardless of whether such causes of action are premised on the alter ego remedy or not and, as explained, the one-year look back period of § 547(b)(4) applies only to the actual transfers.

E. Whether Geoffrey Lorenz May Avoid Liability Based Upon His Having a Perfected Secured Interest in the Dellsa Note and Mortgage Depends Upon Resolution of Count 2 of the Complaint and Counts 8 and 9 of the Amended Complaint

Defendant Geoffrey Lorenz also argues that the Trustee cannot avoid the payments made to him on the Dellsa Note and Dellsa Mortgage because he held a "perfected assignment" of those documents, stating that "the security interest/assignment given by Lorenz Properties LLC to Geoffrey Lorenz was perfected as of March 25, 2009, six (6) days prior to the filing of the petition." (Adv. Doc. 26, p. 4; Adv. Doc. 21, p. 3). This argument may be persuasive if the Trustee were not seeking to avoid the transfer of the Dellsa Note and Dellsa Mortgage to Geoffrey Lorenz as being a preferential and fraudulent transfer. However, given those claims asserted by the Trustee, this argument does not support dismissal of the Complaint or the denial of the *Motion for Leave to Amend Complaint*.

It is true that payments or other transfers to a perfected secured creditor cannot usually be avoided as preferential or fraudulent transfers. *See Melamed v. Lake County Nat'l Bank*, 727 F.2d 1399, 1402 (6th Cir. 1984); *Henry v. Lehman Commer. Paper, Inc.* (*In re First Alliance Mtge. Co.*), 471 F.3d 977, 1008 (9th Cir. 2006); *Richardson v. Huntington Nat'l Bank* (*In re CyberCo Holdings, Inc.*), 382 B.R. 118, 137-38 (Bankr. W.D. Mich. 2008). This is because the repayment of fully secured obligations – when a transfer results in a dollar for dollar reduction in the debtor's liability to the secured creditor – does not hinder, delay, or defraud

creditors because any such transfer does not diminish the net amount that would be available for distribution to the unsecured creditors. *See Chase Manhattan Mtge. Corp. v. Shapiro (In re Lee),* 530 F.3d 458, 464 (6th Cir. 2008); *Waldschmidt v. Mid-State Homes, Inc. (In re Pitman)*, 843 F.2d 235, 241 (6th Cir. 1988) ("The concept here is the same as the idea developed in old Supreme Court opinions under old bankruptcy acts – that a voidable preference must 'impair' . . . or 'diminish' . . . the estate. It is also the same as the idea developed in more recent circuit court opinions holding that payments made to a fully secured creditor were not voidable transfers because the payments reduced the amount of the debt with a corresponding increase in the value of the debtor's equity in the collateral.") (citations omitted). A perfected secured creditor does not receive a fraudulent conveyance when the creditor receives payments from the debtor because the secured creditor is transferring reasonably equivalent value to the debtor through the corresponding increase in the value of the debtor's equity in collateral. *See In re Venice-Oxford Assocs. Ltd. P'ship.,* 236 B.R. 820, 834 (Bankr. M.D. Fla. 1999).

However, the Trustee is not only seeking recovery of the payments made to Geoffrey Lorenz on the Dellsa Note and Mortgage, but is also seeking to avoid the transfer of the Dellsa Note and Dellsa Mortgage and the recording of the Dellsa Mortgage as preferences and fraudulent conveyances. *See* Count 2 (Complaint) and Counts 8 & 9 (Proposed Amended Complaint). The perfection of liens through recording of mortgages and the perfection of other security interests and liens that occur within the applicable preference period, in this case one year for insiders, may be avoided as preferences. *See Chase Manhattan Mtge. Corp.*, 530 F.3d at 464-465; *Superior Bank, FSB v. Boyd* (*In re Lewis*), 398 F.3d 735, 746 (6th Cir.

2005); *Seaver v. Mortgage Elec. Regis. Sys., Inc.* (*In re Schwartz*), 383 B.R. 119, 123 (BAP 8th Cir. 2008). In addition, such conveyances may be pursued as fraudulent conveyances if falling within the applicable limitation period. *See Wood v. Delury, Pomares & Co. (In re Fair Oaks, Ltd.)*, 168 B.R. 397, 401 (BAP 9th Cir. 1994) (transfer of deed of trust is transfer of interest in real property for purposes of § 548); *W.E. Tucker Oil Co., Inc. v. First State Bank of Crossett (In re W.E. Tucker Oil Co.)*, 55 B.R. 78, 81 (Bankr. W.D. Ark. 1985). The transfers of the Dellsa Note and Dellsa Mortgage to Geoffrey Lorenz and the recording of the Dellsa Mortgage appear to fall within the applicable limitation and look-back periods and, accordingly, to the extent the Trustee prevails on her preference or fraudulent conveyance claims as to the transfer of the interests in the Dellsa Note and Mortgage to Geoffrey Lorenz and as to the transfer of any interest through the recording of the Mortgage, any payments made to Geoffrey Lorenz on account of his holding the Dellsa Note and Dellsa Mortgage would not be on account of a properly perfected secured interest.

Accordingly, because the Trustee is seeking to avoid the transfer of the Dellsa Note and Dellsa Mortgage and the recording of the Dellsa Mortgage as preferential or fraudulent under §§ 547 and 548 and ORC §§ 1336.04 and 1336.05, the Motions to Dismiss must be denied as to the argument that the payments to Geoffrey Lorenz cannot be avoided because they were on account of his perfected secured interest.

F. The Trustee May Proceed With Her Amended Complaint

The Lorenz Defendants raise multiple issues with regard to the *Motion For Leave To Amend Complaint*, which seeks to add a fraudulent transfer claim. The court will address the points not previously addressed.

1. Code Sections 544, 548 and ORC § 1336.04 Allow the Trustee to Pursue the Fraudulent Transfer of the Dellsa Note and Dellsa Mortgage

The Lorenz Defendants argue that the Trustee cannot pursue claims under § 544(a)(1) and the Ohio Uniform Fraudulent Transfer Act (UFTA) because the transfer of the Dellsa Note and Dellsa Mortgage was six days prior to the petition date and the Trustee's rights as a hypothetical lien creditor did not arise until the petition date.

The court agrees with the Trustee that § 544 allows her to pursue a transfer under the UFTA for causes of action that accrued both prior to and subsequent to the transfer. ORC § 1336.04(A)(1) states that "[a] transfer made or an obligation occurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation . . . [w]ith actual intent to hinder, delay, or defraud any creditor of the debtor[.]" *See also* 11 U.S.C. § 548(a)(1)(A) (allowing a trustee to avoid fraudulent transfers within two years of the petition date after such a transfer occurred). While it is true a trustee does not acquire the rights of a lien creditor under § 544(a)(1) until the petition date, the Trustee can use that hypothetical status and her independent powers under §§ 547 and 548 to avoid transfers which were perfected pre-petition.

2. The Trustee May Use ORC § 1336.05(B) By Assuming the Status of an Actual Allowed Unsecured Creditor Pursuant to § 544(b)(1)

The Lorenz Defendants assert the Trustee is limited in pursuing rights under § 544 because any rights as a hypothetical lien creditor arise on the petition date. However, under § 544(b)(1), the Trustee may avoid a transfer that is avoidable under Ohio law by a creditor holding an allowed unsecured claim. In this instance, Brenda Andrew was a creditor of the

Debtor prior to the transfer of the Dellsa Note and the Dellsa Mortgage to Geoffrey Lorenz and holds an allowed unsecured claim. *See* Proof of Claim 7-1. Under ORC § 1336.05(B), Ms. Andrew, as of the petition date, could pursue a fraudulent transfer claim.

However, the Lorenz Defendants argue that ORC § 1336.05(B) cannot be applied because the transfers were completed prior to the bankruptcy petition date. It is true the assignments were perfected pre-petition. However, the unsecured claim of Ms. Andrew pre-dated the transfers[11] and therefore, as of the petition date, the Trustee acquired those potentially superior rights held by Ms. Andrew under § 544(b)(1). *See In re Cincinnati Gear Co.*, 304 B.R. 784, 786, n. 3 (Bankr. S.D. Ohio 2003) (In order to pursue a cause of action under ORC § 1336.05(B), creditor's claim must pre-date the asserted fraudulent conveyance); *Collier on Bankruptcy*, ¶ 544.06[1], p. 544-18 (16th ed. 2010) ("Under section 544(b), the trustee succeeds to the rights of an unsecured creditor in existence at the commencement of the case who may void the transfer under applicable law."). The rights of Ms. Andrew, as an allowed unsecured creditor, were not determined as of the petition date; the petition date is simply the date that the Trustee stepped into the shoes of Ms. Andrew and acquired those rights.

The Lorenz Defendants also argue that Ms. Andrew is only a creditor of the Debtor and is not a creditor of Lorenz Properties, LLC because she never pursued an action against Lorenz Properties LLC. However, being an allowed unsecured creditor of the Debtor's estate triggers the application of 544(b)(1). Whether the Trustee can ultimately avoid the transfers

[11] For the definition of transfer, which includes the creation of a security interest, *see* § 101(54) and ORC § 1336.01(L).

from Lorenz Properties, LLC to Geoffrey Lorenz by using the alter ego remedy is a separate fact issue unresolvable upon the Motions to Dismiss.[12]

Finally, since the two-year statute of limitation under § 546(a), measured from the petition date, did not expire prior to the filing of this adversary proceeding and the state law statute of limitation had also not expired by that time,[13] the Trustee can pursue a claim by acquiring the status of an allowed unsecured creditor as of the petition date. 11 U.S.C. § 544(b)(1). *Gold v. Winget (In re NM Holdings Co., LLC)*, 407 B.R. 232, 264, n. 127 (Bankr. E.D. Mich. 2009).

3. The Good Faith Defense of § 548(c) Cannot Be Resolved Upon a Motion to Dismiss

The Defendants assert that, due to § 548(c), the Trustee could not recover any fraudulent transfer under § 550 because a transferee, such as Geoffrey Lorenz, is entitled to the rights of a good faith purchaser when value is given, and therefore may retain his security interest because he has the rights of a good faith purchaser. Without regard to the merits of this argument, the court determines § 548(c) is an affirmative defense that must be separately plead and proven as an affirmative defense and, therefore, does not constitute a basis to grant a motion to dismiss. *See Orlick v. Kozyak (In re Fin. Federated Title*

[12] The Lorenz Defendants raise two other arguments that § 548(d)(2)(A) bars a claim for a fraudulent transfer under § 548. The argument that Geoffrey Lorenz gave value is a question of fact and, in any event, would not necessarily bar a claim that the transfers was with intent to hinder, delay or defraud. *Schilling v. Heavrin (In re Triple S Restaurants, Inc.)*, 422 F.3d 405, 416 (6th Cir. 2005). The argument that the Dellsa Note and Dellsa Mortgage were not an interest of the Debtor is another example of the fact intensive question raised by the assertion of the alter ego doctrine by the Trustee. Similarly, the argument that the transfer cannot be recovered under § 550 begs the question of whether the alter ego doctrine applies.

[13] The statute of limitations for a fraudulent transfer under ORC § 1336.05(B) is one year from the transfer or the obligation to the creditor was incurred. ORC § 1336.09(C); *James v. McCoy*, 56 F.Supp.2d 919, 925 (S.D. Ohio 1998). The transfer at issue occurred less than a week prior to the petition date.

& *Trust, Inc.)*, 309 F.3d 1325, 1328 (11th Cir. 2002) (§ 548(c) is an affirmative defense); *Slone v. Lassiter (In re Grove-Merritt)*, 406 B.R. 778, 808-10 (Bankr. S.D. Ohio 2009).

4. The Trustee's Amended Complaint Was Timely as a Matter of Course Under FRCP 15(a)(1)(B) and, In the Event It Was Not, the Trustee is Granted Leave to File Her Amended Complaint Pursuant to FRCP 15(a)(2)

The Trustee seeks leave of the court pursuant to FRCP 15, applicable to adversary proceedings through BR 7015, to file an Amended Complaint adding two claims for relief under fraudulent conveyance theories. Proposed Count Eight seeks to recover a fraudulent transfer of the Dellsa Note and Dellsa Mortgage from Lorenz Properties, as the alter ego of the Debtor, to Geoffrey Lorenz. Proposed Count Nine seeks the same recovery based upon ORC §§ 1336.04 and 1336.05.

The amendments are appropriate under FRCP 15(a). First, the *Motion For Leave to Amend* Complaint is timely and appropriate as a matter of course under FRCP 15(a)(1)(B). That provision states that:

> (a) Amendments Before Trial.
>
> (1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course:
>
> * * *
>
> (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

FRCP 15(a)(1)(B). In this case the *Motion for Leave* was filed September 10, 2010, 23 days after Defendants Geoffrey Lorenz and Lorenz Properties, LLC filed their Motion to Dismiss (Adv. Doc. 16). BR 9006(f) adds 3 days to the 21 day period provided by FRCP 15(a)(1)(B). Accordingly, the Amended Complaint is timely as a matter of course under FRCP 15(a)(1)(B).

However, even if the Amended Complaint was not timely under FRCP 15(a)(1)(B), the Trustee is granted leave to file the Amended Complaint pursuant to FRCP 15(a)(2). FRCP 15(a)(2) provides that:

> (2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

FRCP 15(a)(2). While a trial court has discretion in deciding whether to grant leave to amend a pleading, "that discretion is limited by Fed. R. Civ. P. 15(a)'s liberal policy of permitting amendments to ensure the determination of claims on their merits." *Marks v Shell Oil Co*., 830 F2d 68, 69 (6th Cir. 1987).

The Defendants argue that the motion to amend the Complaint should not be granted for the following reasons:

1. The subject assets are/were owned by Lorenz Properties, LLC, not by the debtor individually;
2. The Trustee lacks standing to pursue the *alter ego* theory.
3. The fraudulent transfer claims are barred by § 548(c)
4. The Trustee cannot pursue a fraudulent transfer claim pursuant to the elements of ORC §§ 1336.05(B) or 1336.04 and §§ 548 or § 544.
5. The fraudulent transfer claims are barred by the applicable statute of limitations.

The court has addressed all of these points and none of them justify denying the motion to amend. Further, the court finds that the *Motion for Leave To Amend Complaint* was timely filed, having been filed at the early stages of this proceeding, and was not filed for any improper purpose such as to cause delay. Accordingly, the court finds cause for granting the Trustee leave to file her Amended Complaint and, to the extent that the Trustee's Amended Complaint is not timely under FRCP 15(a)(1)(B), the court grants her leave to file the Amended Complaint pursuant to FRCP 15(a)(2).

The court orders that any Amended Complaint be filed within twenty-eight (28) days after the order is entered on this decision as one continuous all-inclusive document. A complaint is a "pleading" as that term is used in FRCP 7(a)(1), applicable by BR 7007. Amended pleadings normally supersede and replace the original pleading. *See ConnectU LLC v. Zuckerberg,* 522 F.3d 82, 91 (1st Cir. 2008), *quoting, Kolling Am. Power Conversion Corp.*, 347 F.3d 11, 16 (1st Cir. 2003) ("An amended complaint, once filed, normally supersedes the antecedent complaint . . . Thereafter, the earlier complaint is a dead letter and 'no longer performs any function in the case.'"). Thus, amendments to pleadings are normally made with the amended pleading superseding the original pleading. While amendments to pleadings can be attachments or addendums to existing pleadings, the court believes that the best practice is to include all paragraphs, counts, and allegations in one complete document, eliminating the need for the court and parties to review the pleading from multiple documents. *See* 3-15 *Moore's Federal Practice – Civil,* § 15.17. Accordingly, the Trustee's amendment of the Complaint shall be through the filing of an Amended Complaint with all paragraphs, counts, and allegations included in one document.[14]

IV. CONCLUSION

For the reasons discussed, the court denies the Motions to Dismiss and grants the Trustee leave to file her Amended Complaint. The Trustee is granted twenty-eight (28) days

[14] The preferred practice is to attach the proposed amended pleading, as a complete document, to the motion seeking leave to file the amended pleading with the proposed amendments red-lined or otherwise conspicuously noted so that the court and other parties can readily discern the proposed changes. *See* 3-15 *Moore's Federal Practice* – Civil, § 15.17[1]. In the event the court grants a motion for leave, the proposed amended pleading should be promptly filed as a separate document on the docket. In the event agreement of all necessary parties is reached as to the filing of an amended pleading prior to or subsequent to the filing of a motion seeking leave, an agreed order granting such leave may be submitted and the Amended Complaint shall be filed promptly after such order is entered as a separate document on the docket.

from the date that the court's order is entered on this decision to file and serve her Amended Complaint. The court is simultaneously entering an order consistent with this decision.

IT IS SO ORDERED.

Copies to:

Stephen D. Brandt, P.O. Box 3340, 2747 W. Alex Bell Road, Dayton, Ohio 45401-3340 (Counsel for the Plaintiff)

Erin B. Moore, P.O. Box 3340, 2747 W. Alex Bell Road, Dayton, Ohio 45401-3340 (Counsel for the Plaintiff)

Lester R. Thompson, 1340 Woodman Drive, Dayton, Ohio 45432 (Counsel for the Defendant Weston A. Lorenz)

Walter Reynolds, Porter, Wright, Morris & Arthur, 1 South Main Street, One Dayton Centre Suite 1600, Dayton, Ohio 45402-2028 (Counsel for the Defendants Geoffrey Lorenz and Lorenz Properties, LLC)

Andria M. Beckham / Kenneth C. Johnson / Laura M. Zaremski, 100 S. Third Street, Columbus, Ohio 43215 (Counsel for Defendant JPMorgan Chase & Co.)

Patrick J. Janis, 1 South Main Street, Suite 1800, Dayton, Ohio 45402 (Counsel for Defendant Dellsa Development Corporation)

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